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MACK-CALI REALTY CORP.; CAL-HARBOR V URBAN RENEWAL ASSOCIATES LP; CAL-HARBOR VII URBAN RENEWAL ASSOCIATES LP; ROSELAND RESIDENTIAL TRUST; GARY WAGNER; IVAN BARON; H.P. ROOSEVELT URBAN RENEWAL COMPANY LLC; CAMBRIDGE CORPORATE SERVICES, INC.; LOCAL 621, UNITED CONSTRUCTION TRADES & INDUSTRIAL UNION; LOCAL 365, UNITED EMPLOYEES OF SERVICE WORKERS; SP PLUS CORPORATION; LOS CUERNOS CORP.; EXCHANGE PLACE ALLIANCE DISTRICT MANAGEMENT CORPORATION; and SPARTAN SECURITY SERVICES, INC., Plaintiffs, vs. STATE OF NEW JERSEY; CITY OF JERSEY CITY; MAYOR AND COUNCIL OF THE CITY OF JERSEY CITY; DONNA MAUER, in her Official Capacity as Director and Chief Financial Officer of the City of Jersey City; and BRIAN PLATT, in his Official Capacity as Business Administrator of the City of Jersey City, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: HUDSON COUNTY DOCKET NO. HUD-L- **Civil Action**

BRIEF ON BEHALF OF PLAINTIFFS IN SUPPORT OF APPLICATION FOR ORDER TO SHOW CAUSE FOR INJUNCTIVE AND DECLARATORY RELIEF

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OVERVIEW

This action challenges a statute enacted by the New Jersey Legislature earlier this year to improperly benefit one municipality in an extremely ill-fitting way, and in an education-funding area where such an approach is impermissible. Because of result-oriented population and median income classifications, that statute (the "Statute") permits only one municipality--Jersey City--to levy a payroll tax (effective January 1, 2019) whose proceeds must be used only for school purposes. The Statute counterintuitively applies only to municipalities with a minimum $55,000 median household income, and thus excludes those in greater need of school aid--the very definition of unconstitutional special legislation, arbitrarily excluding others similarly situated (or more qualified).

The Statute is also contrary to and effectively preempted by the Thorough and Efficient Education Clause of the N.J. Constitution and the long line of Supreme Court constitutional-law decisions (the "Abbott" cases) that have vetoed improper funding legislation, and approved a detailed and intricate school funding formula that includes *statewide* tax contributions. The Statute's reliance on a municipal payroll tax as a funding mechanism, to specially treat one municipality, is clearly precluded by this Constitutionally-approved structure. Not only does the Statute conflict with the school-funding mechanism constitutionally approved by the Supreme Court, but it

also incongruously permits Jersey City to exclude from the payroll all employees resident in Jersey City, while including only non-residents who receive no benefit from the tax.

For related reasons, the Statute violates the N.J. Constitution's (1) Uniformity Clause (as a non-uniform surrogate for a property tax), (2) Anti-Salary-Assessment Clause (disallowing salary assessments for such purposes), and (3) Article I, Paragraph 1. Also, because of its clearly discriminatory treatment of residents and non-residents, the Statute violates the Privileges and Immunities and the dormant Commerce Clauses of the United States Constitution. For these and still other reasons, the Statute is plainly unsustainable.

This action also challenges the payroll tax ordinance (the "Ordinance") adopted by Jersey City (the "City") pursuant to, albeit not in accordance with, the Statute. Invalid for the same reasons as the Statute, the Ordinance is also *ultra vires* as going well beyond what the Statute authorizes, and is invalid for additional reasons as well. *Inter alia*, the Ordinance (1) redefines and vastly expands the definitions of "employee" and "services" that determine the scope of the taxable "payroll"; (2) is vague and ambiguous; (3) is pervasively arbitrary and capricious; and (4) impairs the obligations of PILOT agreements, in violation of the N.J. Constitution. Furthermore, multiple segments of the State and City are adversely affected by this illegal tax. Plaintiffs are representative of adversely affected

employers, property owners, taxpayers, non-resident employees, and others.[1] They seek declaratory relief that the Statute and Ordinance are invalid and unenforceable, and preliminary and permanent injunctive relief enjoining their enforcement.

Finally, the facts of record powerfully belie any assertion that Jersey City "needs" this unlawful tax. These facts were summarized in an official letter from Senate President Stephen Sweeney to Jersey City Mayor Stephen Fulop dated February 27, 2017 (the "Sweeney Letter", Exhibit S); in which Mr. Sweeney explained incisively and with great candor that:

1. Jersey City had been receiving more than its appropriate share of State aid, and had been underfunding its own local share in dramatic fashion.

2. This was at the expense of truly needy districts.[2]

3. It was only through the inertia of certain earlier

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[1]Plaintiffs include real estate developers in Jersey City (Mack-Cali and "Roseland") that employ (*inter alia*) non-Jersey City residents subject to the tax; a "Special Improvement District" that represents business interests in Jersey City; a Jersey City business (Los Cuernos) that rents but does not own property; developers with Jersey City PILOT agreements, viz., the "Cal-Harbor" entities and H.P. Roosevelt (the "Urban Renewal Entities"); two unions (Local 621 and Local 365) with members who work in Jersey City, some living elsewhere in New Jersey or out-of-State; New York City ("NYC") businesses (Cambridge and Spartan) that have employees located at its Jersey City clients' facilities; "SP Plus", headquartered in Chicago, but with employees based in Jersey City; someone living in NYC who works in Jersey City (Baron); and someone who lives elsewhere in New Jersey but works in Jersey City (Wagner).

[2]Though not quoted by Senate President Sweeney, the "poorest" districts delineated by Abbott XXI (as discussed below).

laws that Jersey City was receiving so much more than it should.

4. Jersey City is a "booming city" with "sizable ratable and income growth", continually seeking funding beyond its entitlement at the expense of other cities.

5. "Jersey City pays just 36% of its fair share of its school funding--the fifth lowest percentage in the State. Jersey City underfunds the local SFRA share to its school by $202,000,000...". Jersey City also refuses to apply the nine-figure amounts it receives for PILOT payments to even partially defray school funding.

STATEMENT OF JUDICIALLY NOTICEABLE FACTS AND LEGAL BACKGROUND

As is often true with challenges to the validity of statutes and ordinances, the facts consist of judicially noticeable legislative actions and the like. The self-explanatory harms to plaintiffs are detailed in the Verified Complaint and in Certifications of two exemplar plaintiffs.[3]

The Statute: The Statute is an unlawful extension of the Local Tax Authorization Act, N.J.S.A. 40:48C-1 to -42 ("the Act"); adopted in 1970, in the aftermath of the 1967 Newark riots, to help Newark address its continuing fiscal problems by levying a payroll tax for *general municipal purposes*. Hudson County

[3]"¶" references are to the accompanying Verified Complaint ("Complaint"). Exhibit ("Ex.") references are to the judicially noticeable documents annexed to the accompanying Grossman Cert. See also enclosed the Certifications of Michael J. DeMarco, CEO of Mack-Cali Realty Corp. ("MCRC") and Stephen Goldblatt of Local 621 ("DeMarco Cert." and "Goldblatt Cert.").

Chamber of Commerce v. Jersey City, 310 N.J.Super. 208 (App. Div. 1997), aff'd in part o.b., 153 N.J. 254 (1998) ("Hudson"). There followed a series of amendments to the Act that, because of population classifications, made Newark the only municipality eligible to adopt a payroll tax until 1990. (Id.). The present tax goes to the extreme of purporting to allow Jersey City pay for *local education* through (1) enactments at odds with "Abbott", and (2) what is in effect extraterritorial taxation.

Once before, Jersey City tried to adopt a payroll tax (for general municipal purposes), but failed. Although the City was eligible to adopt such a tax under a 1990 amendment to the Act, it did not do so until December 6, 1995. (Id.) After a delay,[4] legislation enacted on June 17, 1996, retroactive to January 1, 1996, amended N.J.S.A. 40:48C-19 to add a "longevity" condition effectively excluding Jersey City. (Id.)[5] The present Statute is a misguided attempt to resurrect and worsen a substantively flawed and improperly-purposed payroll tax for Jersey City.

Effective July 24, 2018, the Legislature eliminated the "longevity" requirement that had barred Jersey City. (¶68; Ex. A, C). The Act was simultaneously amended so that a municipality

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[4]The day before the tax would have become effective, a referendum petition was filed. Although subsequently withdrawn, the petition inherently delayed the effective date of the Ordinance until January 27, 1996. (Id.).

[5]Per the Governor's legislative Statement, this amendment was **"meant to protect businesses, like those in Jersey City, who are not accustomed to the payroll tax and would be adversely affected by the imposition of one."** (Ex. J, emphasis added).

with a population of 200,000 or more and a median household income of $55,000 or more could adopt a 1% payroll tax ordinance to be used "exclusively for school purposes". (¶¶69-70; Ex. A). This coincided with the State's cut of hundreds of millions of dollars of school aid to municipalities, including $151.5 million to Jersey City over a five-year period. (Ex. D). The June 11, 2018 Assembly Bill Statement made clear that the amendments were solely for Jersey City's benefit--and to provide monies not for general municipal purposes, but for school purposes (to offset State education-aid cuts) [¶72; Ex. C.]:

> This bill would allow all other municipalities [other than Newark] with a population of at least 200,000, presently only Jersey City, to impose and collect an employer payroll tax. This bill would require that employer payroll tax revenues be paid to the school district on a monthly basis if the municipality has a median household income of $55,000 or more. Presently, Jersey City is the only municipality under the bill that would be both eligible to impose an employer payroll tax and meet the median household income threshold which triggers the requirement to use employer payroll tax revenues for school purposes. ***The bill would help offset certain reductions in State school aid that may be in effect after State fiscal year 2018, as is currently being considered by the Legislature in the form of Senate Bill No. 2....

The effect was to irrationally exclude better-qualified municipalities more in need of school funds, including Newark, not to mention (a) truly impoverished cities such as Camden, and (b) cities suffering proportionately larger school budget cuts in 2018. The Statute (1) illogically 'lumped together' (a) Newark, which was allowed to be the sole beneficiary of the

initial payroll tax because of its "unique financial problems", City of Jersey City v. Farmer, 329 N.J. Super, 27, 42 (App. Div. 2000), certif. den. 165 N.J. 135 (2000), and (b) Jersey City, expressly selected in 2018 because of its relative *wealth* (minimum $55,000 median income)--but then (2) went out of its way to benefit only the wealthier Jersey City with the education-use clause.

Moreover, unlike the original payroll tax helping Newark fund its municipal services 'post-riots', the 2018 Jersey City version earmarked the money for local education, though being raised exclusively on non-residents' payroll. This approach (1) illogically protects those benefiting from the tax (the local residents whose school system is being funded) and targets the payroll of non-residents who receive no benefit; and (2) distorts the payroll-tax concept into an unrecognizable specter of the Newark-favoring payroll tax designed to help what the Farmer Court described as a uniquely impoverished City.

Even the 'Newark' concept of local payroll tax for general municipal services is 'light years' less objectionable than this 'worst of all worlds' tax on non-resident payroll for local schools (including payrolls of businesses that do not even own local property). And, as a school (not general services) tax, it does not benefit the companies and employees whose payrolls are being levied. Finally, through a tortured "supervisor" definition, a company's worldwide payroll can be subject to the

tax if it has a "supervisor" sitting in Jersey City.

The Ordinance: The Ordinance far exceeds the Statute's scope (as well as being (1) vague and ambiguous, and (2) arbitrary and capricious). For example, the Ordinance utilizes devices that expand the payroll taxed well beyond the statutory authorization. While the definition of "payroll" mirrors the Act in one way (applying the tax to salary subject to federal withholding), the Ordinance expands payroll through the 'back door' by far more expansively defining (1) "employees" and (2) "services"; so that the tax includes not just "withholding" employees but also independent contractors, contract employees, leased employees, and real estate salespersons. Because of these expanded definitions, together with the immense reach of the statutory/ordinance "supervisor" definition, the scope of the monies subject to the payroll tax is breathtaking.

LEGAL ARGUMENT

POINT I: THE STATUTE CONSTITUTES UNCONSTITUTIONAL SPECIAL LEGISLATION, BECAUSE THE CLASSIFICATION IS PLAINLY EXCLUSIONARY WITHOUT ANY RATIONAL BASIS.

Our State's highest Court established a three-part test for whether a statute constitutes improper special legislation[6]:

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[6]The N.J. Constitution provides that: "The Legislature shall not pass any private, special or local laws...[r]elating to taxation or exemption therefrom" but, rather, "shall pass general laws" in such cases. Article IV, Section VII, Para. 9 (6, 7). See also N.J. Const., Article VIII, Sec. I, Para. 2 ("Exemption from taxation may be granted only by general laws."); Article IV, Section VII, Para. 7 ("No general law shall embrace any provision of a private, special or local character.").

> [W]e first discern the purpose and object of the enactment. We then undertake to apply it to the factual situation presented. Finally we decide whether, *as so applied*, the resulting classification can be said to rest upon any rational or reasonable basis relevant to the purpose and object of the act.

Vreeland v. Byrne, 72 N.J. 292, 300-301 (1977) (italics in original). The inquiry is "whether there are persons similarly situated to those embraced within the act, who, by the terms of the act, are excluded from its operation." Id. at 299.[7] "The test...is whether the classification is reasonable, not arbitrary, and can be said to rest upon some rational basis justifying the distinction." Id.

The Statute constitutes unlawful special legislation because its classifications are arbitrary in multiple regards:

1. The Statute creates a one-municipality classification to generate school funding, when only *statewide* funding has been deemed by our Supreme Court to be constitutionally permitted to supplement local property taxation.

2. Other municipalities excluded by the Statute are either far poorer and/or lost proportionately more school aid this year (¶¶95, 218; Ex. E)--and yet are disabled from relying upon the same mechanism that Jersey City can now utilize. Indeed, if arguendo (a) payroll fund-raising by only one municipality were permitted, and (b) seeking funds from

[7]The test is essentially the same as New Jersey's test for equal protection, no matter the type of entity. See Paul Kimball Hospital, Inc. v. Brick Tp. Hospital, 86 N.J. 429, 446 (1981).

activities beyond the municipality's borders for local schools were permitted (neither is true), there is no rational way to classify Jersey City as the only municipality allowed to do so; since even Newark, plainly subject to the payroll tax, is forbidden from raising educational funds in this fashion, yet it is more qualified in terms in being more impoverished and having a greater need for such funds if they were lawfully permitted to be raised in this fashion. Certainly the State's school-aid cut is no justification to then pass special legislation creating a new 'balkanized' tax regime, especially in a statewide Abbott context, and even more so in light of the Sweeney Letter.

3. Therefore, even though the purpose and method fail under the law, *so does the classification*, since it is only through improper special legislation that Jersey City has this privilege and neither Newark nor any other municipality does (many poorer, many with much greater 2018 education cuts).

As noted, legislation benefiting only one city *in the area of education funding* is particularly arbitrary. The only constitutionally approved method of funding education is through local property tax base supplemented as needed by **statewide** funding to fulfill the **State's** T&E obligation. Each plaintiff, each taxpayer, and each remote employee whose salary is subject to the present tax already pays its/his/her fair share of taxes for the schools in his municipality of residence. It is impermissible to allow Jersey City alone to also burden these

foreign residents; whether they be (a) the non-Jersey City employees or even (b) the entities that may have some presence in Jersey City, but either (i) already pay property taxes there, and/or (ii) have "brick and mortar" operations (and thus pay their real estate taxes for schools) *elsewhere*--all of this in addition to paying their statewide taxes partially earmarked for education aid. Why do businesses partially located in Jersey City have to suffer with a *third* New Jersey education tax?

This constitutes particularly indefensible special legislation, allowing one municipality to add yet another layer of burden that no other municipality in New Jersey can utilize to help fund its own schools, even those municipalities which are needier. Indeed, the statute identities Jersey City as particularly *lacking* in need, due to its higher median income that qualifies it for the special legislation privilege.

While a statute is presumed valid, no statute "can authorize an unconstitutional practice"; "wherever a statute and the constitution come into conflict, the statute must give way." Town of Secaucus v. Hudson Cty. Bd. of Tax., 133 N.J. 482, 494 (1993) ("Secaucus"). See also Mahwah v. Bergen Cty. Bd. of Tax., 98 N.J. 268, 283 (1985) ("Mahwah"); Newark Superior Off. Ass'n. v. Newark, 98 N.J. 212, 223 (1985) ("Newark"). As each such case makes clear, the presumption of validity must yield, as here, when a statute "clearly and irremediably" violates the N.J. Constitution special-legislation prohibition.

The Secaucus statute provided that in any "first class" county with population not above 700,000, each municipality that had maintained a vocational educational program for twenty years was exempt from taxes apportionable to the *county* vocational school. Hudson County then devised a two-tier tax system under which Bayonne paid a county tax rate lower than the County's other municipalities, thus exempting *Bayonne only* from its share of taxes for the County Vocational School--supposedly because of the high quality of Bayonne's local vocational program.

Secaucus held that the statute had no valid or identifiable legislative purpose. 133 N.J. at 495-96. If the purpose of the statute was to relieve municipalities that make double contributions for vocational programs, it was unreasonable to limit the statute to programs of twenty years or more. If its purpose was to promote high-quality vocational programs within densely-populated communities, it was illogical to exclude counties like Essex and Bergen (or even less densely populated counties like Union and Middlesex). The rationales for the statute's limitations were "remote, if not illusory" and "stretch[ed] credulity beyond reasonable limits." Id. at 497-98.

Secaucus carefully examined the statute's legislative history, and found that the circumstances of its amendment[8]

[8]The amendments were directed toward only Bayonne, and "[t]he special nature of the legislation was recognized by the Senate Education Committee itself, which described the legislation as a bill to 'exempt the *City of Bayonne* from any assessment of taxes

reinforced the perception that the statute constitutes special legislation illogically favoring Bayonne. Id. at 499-500.

While Secaucus noted that a statute is not unconstitutional as special legislation merely because its effect is limited to a particular municipality, it added (id. at 500):

> Nevertheless, the classification by which a state limits its effects must be grounded in a rational basis. When a statute has the effect of addressing the needs of a particular community or serving a particular legislative purpose, the Court looks to, *inter alia*, whether "other municipalities could, and from time to time have, come within its scope".

The classification *sub judice* is much less rational than the invalid one in Secaucus. For example, the Statute tries to 'end-run' constitutionally-mandated statewide funding intended for **"the poorest"** districts[9] per Abbott XII, by enabling a self-defined wealthier district to tax entities and payroll with no connection to or benefit from local schools; whereas other districts excluded from the classification would be at least as needy.[10] This classification favors the least qualified district and excludes those more qualified--those with lower incomes, suffering greater cuts to school aid this year, and so forth.

Mahwah involved a challenge to a statutory amendment. The Statute had provided a partial rebate of a municipality's

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due to the cost of supporting the county vocational school in Hudson County.'" Id. at 499 (italics in original).

[9]Abbott v. Burke, 206 N.J. 332, 340 n.1 (2011) (emphasis added). See also Abbott v. Burke, 199 N.J. 140 (2009) ("Abbott XX").

county- tax share if the municipality was located in a first-class county with a population in excess of 800,000 and there were 200 acres or more of land used by a state or county institution. The amendment foreclosed any municipality that had not received the rebate from later receiving same. 98 N.J. at 271. Under the statute as amended, the artificial requirement of "having received" such a rebate rendered Cedar Grove the only municipality qualified to receive the rebate. Id. at 277. While the underlying *statute* was rational, the Court invalidated the *amendment* as special legislation, finding it difficult to conceive a rational basis for excluding other municipalities--because the reasoning that supports the constitutionality of the original statute would also apply to municipalities that later satisfy the requirements of the rebate act. Id. at 293-94.

Newark also involved a challenge to a statutory amendment. The statute allowed the mayors of cities of the first class with a "Mayor-Council Plan C" form of government (under the Optional Municipal Charter Law) to appoint their police chiefs. The amendment limited application of the statute to any city of the first class which had already adopted that form of government. Only Newark and Jersey City qualified under the statute; the amendment operated to exclude any other cities from later qualifying. While the Court again found the underlying statute

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[10]All of this goes beyond the fact that a localized payroll-tax methodology is inherently impermissible under Abbott.

rational, it again (98 N.J. at 223) invalidated the *amendment* as special legislation on the same exclusionary basis as in Mahwah:

> [I]n deciding whether an act is special or general legislation, the determining factor is what is excluded and not what is included. *** [I]f no one is excluded who should be included, the law is general. A general law is one that affects equally all of a group who, bearing in mind the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class themselves.

The Statute is arbitrarily "exclusionary" and hence invalid special legislation. Again, the essential inquiry is whether the statute excludes persons (cities) similarly situated to those it embraces. Newark is poorer and in greater need of school aid. Furthermore, Jersey City was not the only municipality that lost state school funding aid this year. Dozens of other municipalities did as well, including both municipalities excluded by the arbitrary population classification of 200,000 and even needier municipalities excluded by the arbitrary median household income classification of $55,000. Many took a much greater percentage loss, some more than double. (¶¶95, 218; Ex. E). There is no rational basis for excluding (from the educational dedication of funds permitted by this law) (a) cities with, say, six-figure populations and median incomes far less than $55,000 who have suffered greater state-funding cuts--thus, *needier still;* or (b) Newark itself.[11]

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[11]Indeed, here the Statute further provides improper "special" benefits by allowing its subject cities *alone* to tax "brick and mortar" payrolls in other municipalities through the "supervisor"

Further, as in Secaucus, the legislative history reinforces the fact that the Statute constitutes special legislation. According to the Statement on the Assembly Bill (Ex. C):

> Presently, Jersey City is the only municipality under the bill that would be both eligible to impose an employer payroll tax and meet the median household income threshold which triggers the requirement to use employer payroll tax revenues for school purposes.

POINT II: THE ENACTMENTS VIOLATE THE THOROUGH AND EFFICIENT EDUCATION CLAUSE OF THE N.J. CONSTITUTION AND THE WELL-ESTABLISHED BODY OF SUPREME COURT LAW EMANATING THEREFROM, BY GERRYMANDERING A TAX AT ODDS WITH THE JUDICIALLY APPROVED SFRA.

A "local" payroll tax to pay for education is not sustainable under Abbott; especially a tax (a) for one city only (and a *minimum* median-income), (b) exempting payroll for local residents, (c) extending extraterritorially to affect "brick and mortar" in other New Jersey municipalities (and States and countries), and (d) acting as an 'end run' around Abbott.

N.J. Const. Article VIII, Section IV, Paragraph 1 states that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient [education]". The subsequent history of this provision--including the Robinson/Abbott decisions addressing whether taxation and funding complied with the Constitutional provision and N.J. Supreme Court rulings--makes clear that the Supreme Court has reserved to itself exclusive control of what constitutes compliance; has required

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provision--despite having their no unique characteristics warranting this exclusive extraterritorial benefit.

any supplemental district aid to be *from the State*; and has rejected legislation not complying with its edicts.

Robinson v. Cahill, 62 N.J. 473 (1973), invalidated the then-current school funding system, as not yielding a "thorough and efficient" education. Asserting its ultimate authority in the area, the Court noted (id. at 513, emphasis added):

> Whether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the **State's** to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the **State must itself** meet its continuing obligation. [12]

After a series of fits and starts, where the Court made it plain that the Legislature was not honoring its constitutional obligations, in 2008 the Legislature enacted the School Funding Reform Act, N.J.S.A. 18A:7F-43 *et seq.* (the "SFRA"). The SFRA established an intricate weighted school funding formula "to develop an equitable and predictable way to distribute State aid." N.J.S.A. 18A:7F-44(h). As detailed in Abbott and in our Complaint (¶¶47-49), the SFRA formula is consistent with N.J. Supreme Court rulings that there are two permissible ways to

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[12]See also Abbott XXI at 340 n. 1 (the "**poorest**" districts); and at 386: "[Abbott II] further held the 1975 Act must be amended to provide for funding of poor urban districts at the same level as affluent districts and such funding cannot depend on the districts' ability to tax; the level of funding must be guaranteed and mandated **by the State**; and the level of funding must adequately provide for the special needs of the **poor** urban

fund schools--(1) district property taxes, and (2) statewide funding to equalize any T&E shortfall from the district property tax base. The formula is based on determining (a) each District's "Adequacy Budget", (b) the "Local Share", and (c) State Equalization Aid (the difference between the Adequacy Budget and the Local Share).[13] The SFRA has been neither repealed nor amended, and has been 'blessed' by our State's highest Court as the solution to the Robinson/Abbott constitutional impasse. Adding this conflicting "payroll tax" side-by-side with the SFRA is irrational, and a repetition of the Legislature's bad behavior in this area highlighted in Abbott XXI.[14]

In holding that the SFRA was a constitutionally-appropriate solution to the parity remedy, the Court cautioned:

> Our approval of SFRA under the State Constitution relies, as it must, on the information currently available. But a state funding formula's constitutionality is not an occurrence at a moment in time; it is a continuing obligation. Today's holding issues in the good faith anticipation of a continued commitment by the Legislature and Executive to address whatever adjustments are necessary to keep SFRA operating at its optimal level. . . There should be no doubt that we would require remediation of any

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districts." (emphasis added)

[13]T&E relief requires the State to fund needy districts to bring their budgets on par with the State's wealthiest districts. Under the SFRA, if a district is deemed unable to reasonably fund its own schools through its property tax base, an "equalization" amount must be funded by the State: the difference between (a) statewide property values and income, and (b) the property values and income of the ***district's*** residents.

[14]Like the failure to fully fund its 2011 SFRA obligation, the Statute constitutes a failure by the State to honor its Abbott XX obligations to fully fund its SFRA obligations.

> deficiencies of a constitutional dimension, if such problems do emerge. [Abbott XX, 199 N.J. at 146.]

Abbott XX concluded that the SFRA was constitutional as long as the **State** continued to provide school funding aid *at the levels required by the SFRA's formula* over a three-year period (at the end of which period the formula would be reviewed). But two years later, Abbott XXI faced a Legislature that had failed to fully fund the SFRA--and pointed out that its ruling in Abbott XX was "clear" and "exacting". The Court disagreed that it must defer to the Legislature because the latter's authority over appropriations is supposedly plenary under the Appropriations Clause of the N.J. Constitution. The Court held that the appropriations shortfall purported to suspend:

> **not a statutory right, but rather a constitutional obligation** [which] … has been the subject of **more than twenty court decisions or orders defining its reach and establishing judicial remedies** [and where]…**the formula...was** one created by the State itself, and **made applicable to the plaintiff pupils of Abbott districts**, in lieu of prior judicial remedies, **by this Court.** [Abbott XXI at 342-43 (emphasis added).][15]

As further explained in Abbott XXI (206 N.J. at 369):

> When this Court permitted the substitution of our prior orders, which remediated a constitutional violation, with the State's alternative of SFRA funding, it did not alter the constitutional underpinnings to the replacement relief. Our grant of relief was clear and it was exacting: It came with express mandates. We required full funding, and a

[15]Because the State failed to fund the SFRA for fiscal year 2011, Abbott XXI held that failure to fully fund the SFRA was "nothing less than a reneging on the representations it made when it was allowed to exchange SFRA funding for the parity remedy. Thus, the State has breached the very premise underlying the grant of relief it secured with Abbott XX". 206 N.J. at 341.

> retooling of SFRA's formula's parts, at the designated mileposts in the formula's implementation. When we granted the State the relief it requested, this Court did not authorize the State to replace the parity remedy with some underfunded version of SFRA.

That is why Abbott XXI (id.) concluded that the State was required to provide full SFRA funding for Abbott districts:

> We hold that the plaintiff class of schoolchildren from the Abbott districts cannot be deprived of the full SFRA funding that the State offered, and received approval to exchange for the decisions and remedial orders that had previously established the funding required for such school districts. [Emphasis added.]

The SFRA's formula is inextricably intertwined with the Supreme Court's Constitutional *aegis* over the issue. That formula conflicts with the *ad hoc* notion of funding schools via a payroll tax, let alone for a single district. Such a tax is not based on local property taxes or statewide equalization funding, and would only skew the approved formula (still in effect under the SFRA) in violation of the principles upon which it is based. Equally inconsistent with the SFRA and the Supreme Court's precedents, the tax is incongruously based solely on monies earned by Jersey City non-residents, who do not benefit from the funding of Jersey City schools--and are already contributing to the funding of their own public schools through their property taxes. Contrary to the SFRA, the tax also includes (1) payroll of non-property owning companies in Jersey City; and (through an overbroad "supervisor" construct) (2) brick and mortar operations a town, county, state or country

away. In short, the N.J. Supreme Court has carved out this area as its province, and has repudiated statutes that do not conform to (a) the Court's edicts and remedies or (b) the school funding formula it approved. The Statute is just such a violation.

The Enactments are also unconstitutional under the T&E Clause because there is no constitutionally permitted reason why Jersey City can stand on a different funding foundation that every other school district, including less wealthy or more deeply-cut SDA districts. Rather, this is a thinly disguised effort to avoid the State's putative T&E obligation by shifting a portion of the State's share to the payroll tax and its counterintuitive non-resident components, to benefit a legislatively-recognized wealthy district.

Finally, the State certainly cannot defend the Statute by claiming that it 'cut' too much from Jersey City, and now must remedy the self-created hardship by these improper means. The Sweeney Letter explains why the 'crisis' is completely artificial. There is no cognizable shortfall. Nonetheless, if *arguendo* the T&E requirement was improperly reduced by the cut of state aid to Jersey City, it must be restored. If not, then Jersey City--with an extremely high tax base, lower tax rates, a small percentage budgeted for education, still disproportionately-high state aid, and with other cities 'worse off'--must adjust its tax rate or tax strategy, rather than be allowed to fund the shortfall on the backs of others.

POINT III: THE ENACTMENTS VIOLATE THE UNIFORMITY CLAUSE OF THE N.J. CONSTITUTION, BECAUSE THEY ARE NON-UNIFORM SURROGATES FOR PROPERTY TAXATION.

The Enactments (1) violate the state constitutional provision mandating uniform taxation Article VIII, Section I, Paragraph 1(a);[16] and (2) evade uniform property taxation by impermissibly substituting for the requisite *local property* school tax an extraterritorial "payroll" tax. (Alternatively, the local payroll tax impermissibly substitutes for *statewide* T&E aid--either way, the maneuver fails.) But if this is a tax to substitute for *Jersey City's* education-funding responsibilities, then it violates the Uniformity Clause.[17]

The tax here constitutes an improper evasion of the Uniformity Clause. To circumvent taxes that should be assessed

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[16]That clause requires that property "be assessed for taxation under general laws and by uniform rules" and that real property "shall be assessed according to the same standard of value ... at the general tax rate of the taxing district in which the property is situated, for the use of such taxing district." Further, N.J. Const. Art. VIII, Sec. I, Para. 2 provides that "[e]xemption from taxation may be granted only by general laws" (no exemption allowed of property used exclusively for religious, educational, and charitable purposes). These clauses are highly relevant to Jersey City selectively raising taxes that the Abbott-approved formula indicates can be raised only through local **property** taxation (or statewide funding).

[17]As to permissible exceptions to uniformity, note that a number of constitutional provisions authorize tax deductions, rebates, exemptions, or abatements in specific circumstances; for example, dedication of (1) the entire net proceeds of the state lottery for state institutions and state aid for education (Article IV, Section VII, Paragraph 2); and (2) personal income tax, or portions thereof, for reducing or offsetting property taxes (Art. VIII, Sec. I, Para. 7). Thus, whenever the Legislature requires the dedication of a tax for a specific

on property owners, the tax is not being assessed (a) under a general law and by uniform rules, nor (b) at the same standard of value regardless of the general tax rate.[18] "Uniformity" is violated by (1) the exemption from the payroll tax of employers whose employees are Jersey City residents; (2) taxing companies whose employees neither live nor work in Jersey City but are "supervised" from a Jersey City; and (3) exemption of certain insurers irrationally excluded (¶¶134-144).

POINT IV: THE ENACTMENTS VIOLATE THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION.

The Privileges and Immunities Clause ("PIC") of the U.S. Constitution provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. Const., Art. IV, Sec. 2, Cl. 1. Employees such as plaintiff Ivan Baron are being denied these rights.

"[T]he pursuit of one's livelihood free from economic discrimination is protected by the clause." Salorio v. Glaser,

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purpose, there has been a voter-approved Referendum **and a Constitutional Amendment expressly authorizing the dedication.**

[18]See Secaucus, supra, 255 N.J. Super. 655 (App. Div. 1992), aff'd on other grounds 133 N.J. 482; where the Appellate Division held that by excusing a "taxpayer" (Bayonne) from having to pay its proportionate share, the statute violated the Uniformity Clause, which mandated a uniform county tax rate as among the county's municipalities. 255 N.J. Super. at 668-69. The Supreme Court in Secaucus invalidated the statute on special legislation grounds, finding it unnecessary to address the uniform taxation point; but did not take issue with the basis for the Appellate Division's ruling. 133 N.J. at 491.

82 N.J. 482, 501 (1980) ("Salorio I").[19] In Hudson Cty. Bldg. & Constr. Trades Council v. City of Jersey City, 960 F.Supp. 823, 829 (D.N.J. 1996), Judge Debevoise recognized "the fundamental right of workers from other states to pursue private employment"[20], in the context of a challenge to another discriminatory Jersey City ordinance.[21]

The rule that has developed is one of "substantial equality of treatment". Austin v. New Hampshire, 420 U.S. 656, 665 (1975) (which struck down New Hampshire's Commuters Tax because it fell exclusively on the income of nonresidents). See also Salorio II, where the N.J. Supreme Court (citing Austin) noted:

> In analyzing a statute challenged under the Privileges and Immunities Clause, it is necessary to determine if the statute discriminates against nonresidents, to

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[19]In Salorio I, the New Jersey Supreme Court remanded for plenary hearing a challenge to the New Jersey Emergency Transportation Tax Act, N.J.S.A. 54:8A-1 to -57, which imposed a commuter tax only on non-residents, so that the trial court could determine whether the Act contravenes the PIC. In Salorio v. Glaser, 93 N.J. 447 (1983) (Salorio II), the Court held that it did.

[20]See also Toomer v. Witsell, 334 U.S. 385, 396 (1948) ("one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.").

[21]One which mandated that recipients of economic incentives from Jersey City make a good-faith effort to hire 51% Jersey City residents for construction and permanent jobs. The Court concluded that, absent Jersey City proving justification, the ordinance "burdens the opportunity of out-of-state residents to seek employment with...private employers, a privilege protected by the Privileges and Immunities Clause." Id. at 830. The Court questioned Jersey City's claim that the ordinance promoted the general welfare of its citizens against high rates of poverty and unemployment, noting that the City had not shown that out-of-state workers were a source of poverty or unemployment within the City's borders--but remanded on that fact issue.

> identify the nature and extent of that discrimination, and to decide whether the discrimination is reasonably related to legitimate purposes that are the bases for the discrimination. If there is no substantial reason for the discrimination, the clause is violated and the inquiry is at an end. [93 N.J. at 454.]

"Put another way, the nonresident must 'constitute a peculiar source of the evil at which the statute is aimed.'" Id. (quoting Hicklin v. Orbeck, 437 U.S. 518, 525-26 (1978). Further, the tax revenue must bear a substantial relationship to the cost of ameliorating the evil. Salorio II, 93 N.J. at 454.

The Enactments clearly fail to satisfy this test. There is simply no legitimate correlation or nexus between the assessment of a payroll tax on the remuneration paid by Jersey City employers to non-resident employees and the purpose for which the monies generated by the payroll tax may be used--i.e., for local Jersey City school purposes not benefiting non-residents.

POINT V: THE ENACTMENTS VIOLATE THE DORMANT COMMERCE CLAUSE OF THE U.S. CONSTITUTION.

The federal Commerce Clause (U.S. Const., Art. I, Sec. 8, Cl. 3) invests Congress with power to regulate interstate commerce. Under the "dormant" Commerce Clause, state regulations "may not discriminate against interstate commerce" nor may they "impose undue burdens on interstate commerce." South Dakota v. Wayfair, 138 S. Ct. 2080, 2091 (2018). When evaluating a tax under the Commerce Clause, a tax is valid only

> ...so long as it (1) applies to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against

> interstate commerce, and (4) is fairly related to the services the State provides. [Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1988).[22]]

Here, the Tax is clearly not "fairly apportioned," because there is no attempt to apportion it at all.[23] The payroll of out-of-state employees is subject to tax in its entirety without any effort to tax only that portion that reflects work performed within Jersey City. The Tax thus plainly fails both the "internal" and "external" consistency tests that control.[24]

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[22] The Supreme Court has relied on this four-part test, known as the "Complete Auto Test," to invalidate dozens of State taxes. See, e.g., Comptroller Of the Treasury v. Wynne, 135 S.Ct. 1787, 1803 (2015); American Trucking Ass'n, Inc. v. Scheiner, 483 U.S. 266, 287 (1984). The N.J. Supreme Court similarly has used the Complete Auto test to void overreaching taxes. See, e.g., Am. Trucking Ass'ns v. State, 180 N.J. 377, 410-411 (2004).

[23] Ordinance Section 22 (no employer shall be required to report or pay a payroll tax to more than one municipality; if another municipality tries to tax the payroll of an employee whom Jersey City is also taxing, the parties should seek to "resolve[] it by agreement" or in the Tax Court) is not "apportionment" (in addition to simply inviting a 'free-for-all'). Apportionment seeks to divide a tax among jurisdictions in a way that reflects the **actual economic activity** performed within that jurisdiction. This provision does nothing of the sort.

[24] In order to determine whether a tax is apportioned fairly, the Supreme Court has mandated that the tax in question be both "internally and externally consistent." Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 185 (1995). The "internally consistent" test asks "whether [the tax's] identical application by every State in the Union would place interstate commerce at a disadvantage". Id. Under Jersey City's tax, with supervisors and employees in different locations, different jurisdictions using the "Jersey City formula" would each tax the same payroll--resulting in the employer owing payroll tax on more than 100% of its payroll. It thus fails internal consistency. *External* consistency focuses on "the economic justification for the State's claim upon the value taxed." Id. It asks, in essence, if there is a "rational relationship between the income attributed to the State and the intrastate values of the enterprise". Hunt

The tax also fails the third prong of the test--it "purposefully or arbitrarily discriminate[s] against interstate commerce in favor of in-state interests." Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). Taxing payroll of only non-residents clearly discriminates against interstate commerce by acting as a tariff: it is more expensive to hire people from outside Jersey City than Jersey City employees.[25]

POINT VI: THE ENACTMENTS VIOLATE THE ANTI-SALARY-ASSESSMENT CLAUSE OF THE NEW JERSEY CONSTITUTION.

Article VIII, Section II, Paragraph 8 of the N.J. Constitution ("Paragraph 8") prohibits "assessments" (or "contributions") against employers "on, or exclusively measured by,…the wages or salaries paid by the employers to the employees…for any purpose other than providing and administering benefits to employees and their families or dependents." The Interpretive Statement that led to the passage of the official ballot and resulted in adoption of this Constitutional provision

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Wesson, Inc. v. Franchise Tax Bd. of Cal., 528 U.S. 458, 464 (2000). Jersey City is taxing the payroll of an employee who works in Utah, for example, simply because she is supervised from Jersey City. No "rational relationship" exists between the amount being taxed and the economic activity within Jersey City. As explained below, New Jersey's Constitution similarly precludes an inter-**municipality** failure to properly apportion.

[25]See Goldblatt Cert. ¶¶6-7. The first and fourth prongs of the Complete Auto test "are animated by similar concerns: both 'limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce.'" Here, although the tax may arguably satisfy these prongs in connection with employees located within Jersey City, it is clear that with respect to those employees who are "supervised" from Jersey City but who work in far-flung States, it does not.

confirms that it is applicable in a case such as this:

> This proposed constitutional amendment prohibits the collection by the State **of assessments based on employee wages and salaries** for any purpose except paying employee benefits…, dedicates all contributions made to the unemployment compensation fund, the State disability benefits fund, or any other employee benefit fund, and all returns on investments of those contributions, to the purpose of that fund, **and prohibits the use of those contributions or returns for any other purpose.** The requirements of this proposed amendment do not apply to the gross income **tax**, which is exclusively dedicated by the state constitution to the purpose of reducing or offsetting local property taxes. [Ex. L, emphasis added]

The Statute effectively constitutes an "assessment" *by the State*, even though it is further implemented by Ordinance. Paragraph 8 also makes clear that the terms "assessments" and "contributions" encompass *taxes*, since it was deemed necessary in its drafting to expressly exclude (from the Constitutional prohibition) certain "taxes"[26]--in recognition of the fact that otherwise all taxes would be encompassed in the provision. A tax such as that imposed here, measured by the wages and salaries of employees, is impermissible unless the money is dedicated to the express purposes set forth in Paragraph 8. It is not, but rather is dedicated, unconstitutionally, for school purposes.

POINT VII: THE ENACTMENTS VIOLATE THE BROAD PROTECTION OF BASIC RIGHTS PROVIDED BY N.J. CONST. ART.I, PARA.1.

N.J. Const., Art. I, Para. 1 has been interpreted as "substantially [albeit implicitly] encompassing rights

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[26]Such as state **income** taxes on personal incomes used "for the purpose of reducing or offsetting property taxes".

guaranteed under the Federal Constitution."[27] The Enactments violate multiple such constitutional protections:

- The Ordinance's arbitrary distinction between residents and non-residents of Jersey City, and the discriminatory treatment afforded employers in Jersey City in contrast to their counterparts in other New Jersey municipalities, violate equal protection rights under the N.J. Constitution. This includes the right to be free from discrimination in **intrastate** commerce. See, e.g., Los Angeles v. Shell Oil Co., 4 Cal.3d 108, 119, 480 P.2d 953, 959-60 (1971), interpreting state constitutional principles indistinguishable from New Jersey's:

> The basic policy underlying the commerce clause of the Federal Constitution [art.1, §8, para.3]--to preserve the free flow of commerce among the states to optimize benefits--is equally applicable to intercity commerce within the state. If fifty independent economic units within the United States are undesirable, **387** economic enclaves within California would be **intolerable**..." [citation omitted, emphasis added]
>
> New Jersey has 565 municipalities.

- The unfairly discriminatory treatment of non-residents of Jersey City violates their right to employment opportunity.

- The Ordinance's vagueness violates due process.

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[27]Sheerr v. Evesham, 184 N.J.Super. 11, 24 (Law Div. 1982) citing Montville v. Block 69, 74 N.J. 1, 18 (1977). Indeed, the N.J. Constitution's protection is ordinarily broader than the federal Constitution. See Montville, id. at 26-27. See also Greenberg v. Kimmelman, 99 N.J. 552, 570 (1985) ("right to employment opportunity", "a vital part of life in a free society", is "protected under the New Jersey Constitution."

POINT VIII: MUNICIPALITIES CANNOT TAX EXTRATERRITORIAL "BRICK AND MORTAR" BUSINESSES, A FORTIORI WHEN THE TAX DEPENDS UPON A FACTOR THAT BEARS NO RELATIONSHIP TO THE ACTIVITY TAKING PLACE WITHIN THE JURISDICTION.

The due process and equal protection principles of N.J. Const., Art. 1, Para. 1, forbid the Jersey City tax's *intrastate* extraterritoriality--*a fortiori* the unprecedented taxation of the payroll of a "brick and mortar" business in another city. There are Constitutional limits on municipal extraterritorial powers, and a very limited legislative power to reasonably expand those powers. As numerous courts have held under state constitutional principles conceptually indistinguishable from N.J.Const., Art. 1, Para. 1, when considering taxes with such broad extraterritoriality:

> [N]o measure of apportionment can satisfy the constitutional standard if the measure of tax is made to depend upon a factor which bears no fair relationship to the proportion of the taxed activity actually taking place within the taxing jurisdiction. [Los Ang. v. Shell, 4 Cal.3d at 124, 480 P.2d at 963.]

POINT IX: THE ORDINANCE IS *ULTRA VIRES* BECAUSE IT MATERIALLY EXCEEDS STATUTORY AUTHORIZATION.

A municipality has only enumerated powers, acts only by delegated authority, and lacks inherent jurisdiction to make laws or adopt regulations.[28] Giannone v. Carlin, 20 N.J. 511, 517

[28]While ordinances are presumed valid, municipalities can exercise only such power as is granted by the Legislature and the State Constitution. "Consequently, the presumption of validity can be overcome if the municipal ordinance exceeds the delegated authority under the governing statute". Paige Land Dev. Corp. v. Bgh. of Riverdale, 2016 N.J.Super. Unpub. LEXIS 625 *6 (App.Div. Mar. 23, 2016)(N.J.Sup.Ct. citations omitted).

(1956). Consequently, "[a]ny exercise of a delegated power by a municipality in a manner not within the purview of the governing statute is capricious and ultra vires of the delegated powers." Id. These principles were violated here.

The Statute authorized imposition of a payroll tax based on remuneration to traditional employees--those subject to federal income tax withholding. This was obviously intended to limit coverage and facilitate compliance. The Legislature did not authorize a "payroll" tax on independent contractors, contract employees, licensed real estate salespersons, or leased employees--or others subject to supervision and direction by the employer--unless their remuneration was subject to federal tax withholding. But the **Ordinance** does.

By its *ultra vires* Ordinance wording, Jersey City has vastly expanded the scope of the Statute and tax, to include "payroll" not encompassed by the Statute. This is particularly pernicious and exponentially magnifies the harm to plaintiffs; as the "supervisor" clause of the Ordinance applies to monies paid to non-residents of Jersey City who live in another municipality, another county, another state, or even another country. Clearly, Jersey City has exceeded its delegated authority under the Statute. At best, the clear legislative employee category has become murky and indefinable; would an "independent contractor" with his own professional firm have to

be added into payroll? Especially with the risk of criminal penalties, the Ordinance should be invalidated.[29]

POINT X: THE ORDINANCE IS VAGUE AND AMBIGUOUS, PLACES TAXPAYERS AT RISK IN TERMS OF GUESSING THE ORDINANCE'S INTENT, AND THUS VIOLATES DUE PROCESS.

The U.S. and N.J. Constitutions render vague laws unenforceable. State v. Cameron, 100 N.J. 586, 591 (1985). The requirement of statutory clarity is essentially a due process concept grounded in notions of fair play. Id.

> Vague laws offend several important values. First, ... we insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. *** Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters ... on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).]

Ambiguity can arise, as here, when an ordinance is subject to various plausible interpretations "or when literal interpretation of the [ordinance]...would lead to a result that is inherently absurd or at odds with either public policy or the overarching statutory scheme of which it is a part". Cashin v. Bello, 223 N.J. 328, 336 (2015). The unclear Ordinance term "supervisor" can lead to enormous monetary disputes. The terms

[29]Jersey City's Ordinance is also *ultra vires* in another important respect. Unlike the Statute, the Ordinance provides that: "No Employer shall deduct or withhold any amount from the remuneration payable to an Employee because of the tax imposed by this chapter." (§304-21). Presumably, this provision does not

"employee" and "services" are not only manifestly vague and ambiguous but also inconsistent with the Statute's "payroll" definition. The Ordinance's ambiguity in terms of coverage only magnifies the absurdity of the draconian consequences of its enforcement. The scope of the "independent contractor" portion of the "employee" definition poses many conundrums, even more so to companies such as Cambridge and Spartan (¶¶33, 39); as to "supervisor", companies like Mack-Cali are particularly at risk (¶258d).

Moreover, the level of judicial scrutiny for vagueness is elevated where the regulatory law impacts on constitutional interests. Cameron, 100 N.J. at 592. That consideration is particularly applicable here because the Ordinance is fraught with Constitutional infirmities, and risks criminality.

POINT XI: THE ENACTMENTS ARE ARBITRARY AND CAPRICIOUS BECAUSE (*INTER ALIA*) THEY MAKE IRRATIONAL DISTINCTIONS BETWEEN CLASSES OF INDIVIDUALS AND ENTITIES.

As the Complaint details, both Enactments are arbitrary[30] in numerous respects. Beyond the *Ordinance's* failings explained in the Complaint[31], the Statute's arbitrary aspects (many improperly

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appear in the Statute because it (a) cannot be reasonably monitored and (b) wrongfully impinges on employers' rights.

[30]Although entitled to a presumption of validity, a statute or municipal action "will be overturned if it is arbitrary, capricious, or unreasonable." Bryant v. City of Atl. City, 309 N.J. Super. 596, 610 (App. Div. 1998) (municipal action); see Bd. of Educ. v. Caffiero, 86 N.J. 309, 317-18 (1981) (statute).

[31]*Inter alia*, the Ordinance arbitrarily (1) interferes with the SFRA; (2) discriminates between residents, who benefit from the

favoring Jersey City, similar to the Statute's "special legislation" failings), are highlighted by the following, and were convincingly detailed further in the Sweeney Letter:

a. State school aid is intended to benefit **"the poorest"** districts (Abbott XXI, 206 N.J. at 340 n.1, emphasis added). Jersey City is legislatively defined as wealthier to qualify for the special 'school payroll tax' privileges denied to Newark *et al.* A *minimum* income is arbitrarily 'in the wrong direction' under Abbott when it comes to school aid.

b. Jersey City is already favored by receiving a disproportionately huge percentage of its school budget in the form of state aid, about 60% (¶97 & n.2), even though it has a higher median income (as verified by the Statute) than others receiving far lesser funding. Moreover, in 'year one' of the current round of cuts, Jersey City is receiving only a .85% reduction in State aid--thus, it is still receiving about 55% of its budget from the State. Even in 'year two', the State is funding about 50% of Jersey City's budget. Jersey City is refraining from taxing its enormous tax base at a standard rate to fund the rest of the small budget shortfall.

c. Jersey City gets the most State aid on a pro rata

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payroll tax, and non-residents (not so); (3) defines "employees" and "services" inconsistently with the Statute; (4) applies to "payrolls" of employees in another county, State, or country who have no relationship to the Ordinance's purpose, via Jersey City "supervisors"; (4) acts extraterritorially in a way inconsistent

basis. Therefore, statewide taxes--portions of which are earmarked for education--disproportionately benefit Jersey City.

d. Meanwhile, other cities that do not receive 'anything close' to such enormous State funding are suffering much greater proportional budget cuts, such as Lakewood Township (with a population of 100,000) suffering a 6.26% reduction; or as another example, Glassboro, a somewhat smaller municipality of 20,000, suffering an 11.20% reduction. (¶218)

POINT XII: THE ENACTMENTS UNCONSTITUTIONALLY IMPAIR OBLIGATIONS OF (AND BREACH) CONTRACTS TO WHICH THE "PILOT" PLAINTIFFS ARE PARTIES, BY SEEKING TO PLACE NEW TAXES ON TAX-EXEMPT URBAN RENEWAL ENTITIES.

N.J. Const., Art. IV, Sec. VII, Para. 3 precludes any law "impairing the obligation of contracts, or depriving a party of any remedy for enforcing a contract which existed when the contract was made." The Enactments violate this principle. The Urban Renewal Entities ("UREs") are Jersey City redevelopers of office/commercial/residential projects.[32] To induce the UREs to so invest, the City and UREs entered into PILOT agreements, which included the LTTE's property tax exemptions. The "PILOT payments" were intended to be the exclusive URE remuneration to

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with established law and recognized municipal powers; and (5) strongly penalizes violations of vague and ambiguous provisions.

[32]And non-profit entities as defined in the Long Term Tax Exemption Law ("LTTE"); formed to assist the City by providing clearance, replanning, development, and redevelopment of blighted areas pursuant to N.J. Const. Art. VIII, Sec. III, Para. 1. Indeed, as a condition of receiving the tax exemption, the UREs had to agree to limit their profits, as per the LTTE.

municipalities, and in lieu of any other taxes.[33] The Ordinance improperly increases URE taxes, both unconstitutionally and in breach of contract and the LTTE.

POINT XIII: PLAINTIFFS ARE ENTITLED TO DECLARATORY RELIEF BECAUSE AN ACTUAL CONTROVERSY EXISTS CONCERNING THE LEGALITY AND EFFECT OF THE ENACTMENTS.

As to Declaratory Judgments, N.J.S.A. 2A:16-53 provides:

> A person...whose rights, status or other legal relations are affected by a statute [or] municipal ordinance...may have determined any question of construction or validity arising under the...statute [or] ordinance...and obtain a declaration of rights, status or other legal relations thereunder.

See also Chamber of Commerce v. State, 89 N.J. 131, 140 (1982):

> [The Uniform Declaratory Judgments Act] authorizes [New Jersey]...courts to declare rights, status and other legal relations so as to afford litigants relief from uncertainty and insecurity. A person whose rights or legal relations are affected by a statute may have the validity of that statute determined.

An actual controversy plainly exists *sub judice* as to the parties' respective rights and responsibilities under the Enactments. Plaintiffs seek declarations, *inter alia*, that:

- The Statute is unconstitutional special legislation.
- The Enactments violate the N.J. Constitution's T&E Clause, Uniformity Clause, and Anti-Salary-Assessments Clause, and the federal Commerce, Due Process, and PIC Clauses, as well as being arbitrary and capricious.
- The Enactments are arbitrary, capricious, and invalid.

[33]Except for providing affordable housing set-asides or "in lieu" financial contributions.

- The Ordinance is not only *ultra vires*, but also vague, ambiguous, and violative of due process.

- The Enactments impair the obligations of, and breach, contracts to which plaintiffs are party.

POINT XIV: PRELIMINARY INJUNCTIVE RELIEF SHOULD BE GRANTED BECAUSE PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE ILLEGAL ENACTMENTS ARE ENFORCED, AND THE BALANCE OF THE EQUITIES FAVORS PLAINTIFFS.

The Ordinance becomes effective on January 1, 2019.[34] Jersey City should be preliminarily enjoined (with a TRO if needed) from enforcing the Ordinance until the Court can meaningfully consider whether plaintiffs are entitled to the declaratory relief sought. See Crowe v. De Gioia, 90 N.J. 126, 132 (1982):

> New Jersey has long recognized, in a wide variety of contexts, the power of the judiciary to "prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case." *** In exercising [their] discretion, courts have been guided traditionally by certain fundamental principles.

These principles require a showing that (a) irreparable harm is likely if the Court denies preliminary relief; (b) the underlying law is well-settled; (c) there exists a reasonable probability of ultimate success; and (d) the balance of the hardships to the parties favors the issuance of the requested relief. Id. at 132-34. Plaintiffs satisfy all these criteria.

Standing astride these elements is the courts' desire to preserve the status quo until such issues can be decided. "On

[34]The Ordinance was not "published" until December 7, 2018.

balance, the equities [frequently] favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Id. at 134. See Waste Mgmt. of N.J., Inc. v. Union County Utils. Auth., 399 N.J.Super. 508, 520 (App. Div. 2008):

> [A]lthough it is generally understood that the *Crowe* factors must weigh in favor of injunctive relief...a court may take a less rigid view than it would after a final hearing when the interlocutory injunction is merely designed to preserve the status quo. *** [This] may permit the court to place less emphasis on a particular *Crowe* factor if another greatly requires the issuance of the remedy. [35]

The above Brief Points show that (1) the legal rights underlying plaintiffs' claims are well-settled and (2) plaintiffs have a reasonable probability of ultimate success on the merits.

Further, plaintiffs will suffer irreparable harm in the absence of preliminary injunctive relief. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. Crowe, id. at 133. Here, plaintiffs will suffer irreparable harm because once implemented, the Ordinance will have consequences that cannot later be quantified: (1) affording an undue competitive advantage to employers in other

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[35]For example, here plaintiffs have demonstrated an extremely strong likelihood of success. But even if arguendo (and unlike here) a party's chance of success is viewed as less than a probability, relief is nonetheless routinely granted by our Courts to preserve the status quo. "[S]o long as there is some merit to the claim", Waste Mgmt. at 535, "[d]oubt of the validity of the complainants' asserted cause of action is therefore not an adequate reason for refusing to maintain the subject of litigation in statu quo pending a definitive settlement of the right on final hearing." Christiansen v. Milk Drivers & Dairy Emps., 127 N.J. Eq. 215, 220 (E. & A. 1940).

municipalities; deterring headquartering of businesses/or expansion of facilities in Jersey City, or installing or leaving supervisory personnel there; incentivizing businesses to leave; deterring future PILOT agreements; deterring the hiring, rewarding, and retention of non-resident employees by Jersey City businesses; and deterring non-residents from working in New Jersey; (see ¶¶100-103 and DeMarco & Goldblatt Certs.); and risk of criminal penalties despite the Ordinance's vagueness.[36]

The relative hardship to the parties requires a balancing of the equities. Crowe, id. at 134. The harm to Jersey City from not implementing its Ordinance is far outweighed by the harm to all those whose businesses and/or employment will suffer, and whose contracts (negotiated in good faith with the City) will be ignored. Moreover, there is an overriding public interest in resolving challenges to an Ordinance which is (a) contrary to the T&E Clause; (b) adopted pursuant to unconstitutional special legislation; and (c) rife with vagueness and other Constitutional deficiencies--to the detriment of not only plaintiffs and others similarly situated, but also other municipalities and non-residents of Jersey City throughout the State. Once the tax is implemented, private and public entities

[36]See Morales v. TWA, 504 U.S. 374, 381 (1992) (risk of even non-criminal "penalties" under law being questioned can constitute irreparable harm); see also Villas at Parkside v. City of Farmers Br., 496 F.Supp. 2d 757, 776 (N.D.Tex. 2007), applying Morales (an impending ordinance's vagueness and criminal penalties strongly indicate irreparable harm under Morales).

(parties and others) will change positions in unpredictable ways. Courts never want to arrive at the point when it is impossible to "unscramble the egg".[37]

Moreover, "[t]he issuance of a preliminary injunction to stay enforcement of an ordinance in a prerogative writ action challenging a statute or ordinance is proper." News Printing Co. v. Totowa, 211 N.J.Super. 121, 129 (Law Div. 1986).[38] Such relief is clearly warranted here to afford a meaningful and timely review of the Ordinance.[39]

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant injunctive and declaratory relief[40].

Respectfully submitted,
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[37]See Mochary v. Caputo, 100 N.J. 119, 129 (1985); NBA v. Williams, 1994 U.S.Dist. LEXIS 8832 *2 (S.D.N.Y. June 29, 1994).

[38]See also Two Guys from Harrison, Inc. v. Furman, 59 N.J.Super. 135 (Law Div. 1959).

[39]A referendum petition under N.J.S.A. 40:69A-185, which would suspend the Ordinance, would be mooted should plaintiffs obtain relief here. To preserve the status quo, the 20-day time period to file such petition should be tolled or extended until this Court rules on the merits.

[40]In DiFrancisco v. Chubb Ins. Co., 283 N.J. Super. 601, 613-615 (App. Div. 1995), the Court (in another context) combined the concepts of (the inherently "expedit[ing]" nature of declaratory judgment, and acceleration in a "summary manner". While that Court specifically suggested a summary proceeding under R. 4:67-1(b), here (where there are no material fact issues) an even more expedited procedure could be adapted by the Court. In any event, with the injunction in place, the Court can creatively expedite its schedule consistent with the spirit of DiFrancisco.